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6
7 Proposed Special Litigation Counsel for
Power Balance, LLC

8 **UNITED STATES BANKRUPTCY COURT**

9 **CENTRAL DISTRICT OF CALIFORNIA**

10 **SANTA ANA DIVISION**

11 In re

Case No. 8:11-bk-25982 TA

12 POWER BALANCE, LLC, a Delaware
limited liability company,

Chapter 11

13 Debtor.

14
15 POWER BALANCE, LLC, a Delaware
limited liability company,

Adv. No.

16 Plaintiff,

**COMPLAINT FOR AVOIDANCE AND
RECOVERY OF PREFERENTIAL
TRANSFERS PURSUANT TO
11 U.S.C. §§ 547(b), 550 AND 551**

17 vs.

18 MERCURY PUBLIC AFFAIRS, LLC, a
19 Delaware limited liability company,

Status Conference:

20 Defendant.

Date: {To Be Set By Court}
Time: {To Be Set By Court}
Place: Courtroom 5B
411 West Fourth Street
Santa Ana, CA 92701

21
22
23 For its Complaint For Avoidance And Recovery Of Preferential Transfers Pursuant
24 To 11 U.S.C. §§ 547(b), 550 And 551 (the "Complaint"), against Mercury Public Affairs,
25 LLC ("Defendant"), Power Balance, LLC, the debtor and debtor in possession in the
26 above-captioned case (the "Debtor" or "Plaintiff"), hereby alleges as follows:
27
28

1 **REQUIRED PLEADING DISCLOSURE**

2 1. In accordance with the requirements of Local Bankruptcy Rule 7008-
3 1, the Plaintiff hereby alleges that the Claims for Relief set forth in the Complaint
4 constitute a core proceeding under 28 U.S.C. § 157(b), in that the Claims for Relief relate
5 directly to property which may be property of the Debtor's bankruptcy estate (the
6 "Estate"). Regardless of whether the Claims for Relief are core or non-core, the Plaintiff
7 hereby consents to the entry of final orders and judgment by the Bankruptcy Court,
8 except as may be precluded by applicable law.

9 **STATEMENT OF JURISDICTION AND PROCEEDINGS**

10 2. Venue properly lies in this judicial district pursuant to 28 U.S.C. §
11 1409(a), in that this is a civil proceeding arising in and/or related to the Debtor's Chapter
12 11 case, styled *In re Power Balance, LLC* (Case No. 8:11-bk-25982-TA) currently
13 pending in the Santa Ana Division of the United States Bankruptcy Court for the Central
14 District of California (the "Bankruptcy Court"). Pursuant to 28 U.S.C. § 1391(b)(2), venue
15 is appropriate in this Central District of California as the acts and conduct complained of
16 herein took place within this district. Accordingly, this Court also has personal jurisdiction
17 over the Defendant.

18 3. The Bankruptcy Court has jurisdiction over this proceeding pursuant
19 to 28 U.S.C. §§157(b)(1) and 1334(a) and General Order No. 242-A of the District Court
20 for the Central District of California, as this is a core proceeding under 28 U.S.C. §
21 157(b)(1) and (2)(F) and (H).

22 4. On November 18, 2011 (the "Petition Date"), the Debtor filed
23 voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code.

24 **PARTIES**

25 5. The Plaintiff is the Debtor, and brings this action for the benefit of the
26 Estate and its creditors. To the extent that Plaintiff hereby asserts claims under 11
27 U.S.C. § 544(b), Plaintiff is informed and believes and, on that basis alleges thereon, that
28 there exists in these cases one or more creditors holding unsecured claims allowable

1 under 11 U.S.C. § 502 or that are not allowable only under 11 U.S.C. § 502(e) who could
2 have avoided the respective transfers or obligations under California or other applicable
3 law before the Debtor's petition was filed.

4 6. Plaintiff is informed and believes and based thereon alleges that
5 Defendant Mercury Public Affairs, LLC is a Delaware limited liability company and is
6 authorized to do and is doing business in the State of California. At all relevant times,
7 Defendant was an entity for whose benefit certain of the recoverable transfers alleged in
8 this Complaint were made; and/or an immediate or mediate transferee of such
9 recoverable transfers.

10 **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

11 7. The Debtor was established in 2009. It marketed hologram
12 bracelets, pendants, necklaces and other items worldwide which purported to improve
13 athletic performance.

14 8. While the Debtor experienced some initial success, In 2010 the
15 Debtor began receiving negative press as a result of numerous accusations that it made
16 false claims regarding the bracelets. In particular, and without limitation, the following
17 events took place:

18 a. In mid-2010 the governments of Spain and Italy launched
19 investigations into Power Balance's claims based upon consumer complaints. Numerous
20 websites were launched throughout the world claiming that Power Balance was a scam.

21 b. In September 2010 a French Regional Institute of Sports
22 Medicine and a French laboratory "Volodalen" concluded that the bracelets were
23 ineffective..

24 c. In October 2010 the University of Wisconsin concluded that
25 the bracelets were ineffective.

26 d. In December 2010 the Australian and Italian governments
27 made findings of insufficient evidence for representations made by Power Balance.
28

1 e. In December 2010 Power Balance entered into a settlement
2 with the Australian government whereby it agreed to provide refunds for a period of six
3 months. As part of the settlement Power Balance also publicly admitted that it had no
4 credible scientific evidence supporting its claims.

5 f. In December 2010 the Italian government fined Power
6 Balance for false and misleading advertising.

7 g. In January 2011 the Netherlands and Argentina launched an
8 investigation.

9 h. At least 22 lawsuits were filed in the United States which were
10 consolidated into several class actions.

11 i. A class action complaint was filed by Andre Batungacal in the
12 Central District of California on January 4, 2011 alleging misleading advertising
13 ("Batungacal Action").

14 j. In April 2011 the District Court granted a motion for
15 preliminary approval of the class.

16 k. On May 23, 2011 Power Balance's Australian distributor was
17 placed into receivership.

18 9. The Debtor entered into a very burdensome supply agreement with
19 Contec Corp., a Hong Kong based corporation ("Contec"), whereby Contec agreed to be
20 the exclusive manufacturer of the Debtor's products. This agreement was for a term of
21 five years. Under the agreement, payment was required 15 days after delivery. In
22 September, 2010, the Debtor placed an order for 5 million units.

23 10. During the one-year period leading up to their bankruptcy filings, the
24 Debtor became insolvent. The value of their assets was substantially less than the sum
25 total of their obligations. Further, the Debtor was unable to pay their bills as the came
26 due. Without limitation, the Debtor was unable to pay for invoices from Contec for
27 inventory the Debtor had ordered. As the Debtor's financial condition worsened, and it
28

1 fell further and further behind in their obligations owing to Contec, and others, and as the
2 lawsuits described above mounted, the Debtor's insolvency deepened.

3 11. During the time that the Debtor was in its precarious financial state,
4 for the purpose and with the intent of hindering, delaying and defrauding the creditors to
5 which the Debtor was indebted, the Debtor's principals began a systematic process of
6 draining the available cash from the Estate, by making large distributions and paying
7 large bonuses to insiders and certain preferred creditors. Certain of these transfers were
8 made for less than reasonably equivalent value in return and during a time in which the
9 Debtor was insolvent or rendered insolvent, or when the Debtor engaged or was about to
10 engage in a business or a transaction for which the remaining assets of the Debtor were
11 unreasonably small in relation to the business or transaction.

12 **ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

13 12. Plaintiff is informed and believes and on that basis alleges, that the
14 Debtor made transfers of property in the form of payments to the Defendant during the 90
15 day period prior to the Petition Date in the total aggregate amount of \$44,979.94 (the
16 "Preferential Transfers"). Attached collectively hereto as **Exhibit "1"** is a chart identifying
17 the Preferential Transfers made to Defendant.

18 **FIRST CLAIM FOR RELIEF**

19 **(Avoidance And Recovery Of Preferential Transfers Pursuant To 11 U.S.C. § 547(b))**

20 13. Plaintiff realleges and incorporates herein by reference each and
21 every allegation contained in paragraphs 1 through 12 as though set forth in full.

22 14. Plaintiff is informed and believes and, on that basis alleges thereon,
23 that the Preferential Transfers were made to Defendant for the benefit of Defendants,
24 who was a creditor of the Debtor at the time of the respective transfers as that term is
25 defined by 11 U.S.C. § 101(10).

26 15. Plaintiff is informed and believes and, on that basis alleges thereon,
27 that the Preferential Transfers were transfers of interests of the Debtor in property.
28

THIRD CLAIM FOR RELIEF

(For Preservation Of Avoided Transfer Pursuant To U.S.C. § 551)

23. Plaintiff realleges and incorporates herein by reference each and every allegation contained in paragraphs 1 through 22 as though set forth in full.

24. Pursuant to 11 U.S.C. § 551, Plaintiff is entitled to preserve any transfer avoided under 11 U.S.C. § 547, including the Preferential Transfers, for the benefit of the estates.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

ON THE FIRST CLAIM FOR RELIEF

1. For a judgment that the Preferential Transfers are avoidable as preferential transfers under 11 U.S.C. § 547(b);

ON THE SECOND CLAIM FOR RELIEF

2. For a judgment that the estates are entitled to recover the Preferential Transfers or the value thereof under 11 U.S.C. § 550;

ON THE THIRD CLAIM FOR RELIEF

3. For a judgment that the estates are entitled to preserve any transfers avoided under 11 U.S.C. § 547(b), including the Preferential Transfers, for the benefit of the estates;

ON ALL CLAIMS FOR RELIEF

4. For interest as permitted by law from the date of the transfers;

5. For costs of suit incurred herein, including, without limitation, attorneys' fees; and

6. For such other and further relief as the Court deems just and proper.

1 DATED: November 15, 2013

Respectfully submitted,

2 **SulmeyerKupetz**
3 A Professional Corporation

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5 By: /s/Steven F. Werth
6 Mark S. Horoupian
7 Steven F. Werth
8 Attorneys for Plaintiff
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EXHIBIT "1"

CHECK DATE	AMOUNT
9/1/2011	\$14,914.20
9/15/2011	\$15,065.74
9/29/2011	\$15,000.00
TOTAL	\$44,979.94

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B104 (FORM 104) (08/07)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS POWER BALANCE, LLC, a Delaware limited liability company	DEFENDANTS MERCURY PUBLIC AFFAIRS, LLC, a Delaware limited liability company	
ATTORNEYS (Firm Name, Address, and Telephone No.) Mark S. Horoupian (CA Bar No. 175373) mhoroupian@sulmeyerlaw.com Steven F. Werth (CA Bar No. 205434) swerth@sulmeyerlaw.com SulmeyerKupetz A Professional Corporation 333 South Hope Street, Thirty-Fifth Floor Los Angeles, California 90071-1406 Tel: (213) 626-2311 Fax: (213) 629-4520	ATTORNEYS (If Known)	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) COMPLAINT FOR AVOIDANCE AND RECOVERY OF PREFERENTIAL TRANSFERS PURSUANT TO 11 U.S.C. §§ 547(b), 550 AND 551		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input checked="" type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)	FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$44,979.94	
Other Relief Sought Costs of suit incurred; attorneys' fees		

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR POWER BALANCE, LLC, a Delaware limited liability company		BANKRUPTCY CASE NO. 8:11-bk-25982 TA
DISTRICT IN WHICH CASE IS PENDING Central District of California	DIVISION OFFICE Santa Ana	NAME OF JUDGE Hon. Theodor C. Albert
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) <i>/s/Steven F. Werth</i>		
DATE November 15, 2013	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Mark S. Horoupian Steven F. Werth {Proposed} Special Litigation Counsel for Power Balance, LLC	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.